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In the Supreme Court
OF THE
United States

OCTOBER TERM 1968

No. 552

N.V. STOOMVAART MAATSCHAPPIJ "NEDERLAND",
Petitioner,

vs.

STANDARD OIL COMPANY OF CALIFORNIA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

This case does not present any important or novel questions.

The district court found that petitioner's vessel, the Rotti, committed substantial faults which contributed to the collision with respondent's vessel, the Tuttle. The court found that: (1) the Rotti's failure to reduce its

full ahead speed of 12 knots upon entry into a dense fog was, under the circumstances, a violation of the moderate speed requirement of Rule 16(a) of the International Rules for Preventing Collisions at Sea (Appx. I to Pet., pp. iv-v; 286 F.Supp. 679[1]) and, alternatively, (2) the Rotti's speed and its maneuvers after observing the Tuttle on radar were in violation of the standard of care as codified in the Radar Amendment to the Rules (Appx. I to Pet., pp. v-vi; 286 F.Supp. 680).[2] Accordingly the district court decreed that damages should be divided between the parties (Appx. I to Pet., p. vii; 286 F.Supp. 680). The court of appeals affirmed on the basis of the opinion of the district court (Appx. I to Pet., p. i).

STATUTES INVOLVED

The statutes involved in this case are Rule 16 of the International Rules for Preventing Collisions at Sea (former 33 U.S.C., sec. 145n; 65 Stat. 417), the Radar Amendment (33 U.S.C., sec. 1077; 77 Stat. 205) and its Annex (33 U.S.C., sec. 1094; 77 Stat. 209). These statutes are set forth in Appendix II to the Petition (pp. viii-xi). Also pertinent to the case is the introductory section to the Radar Amendment (33 U.S.C., sec. 1075; 77 Stat. 203) which is set forth in the Appendix to this brief.

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[1]The decision of the district court has now been reported (*Standard Oil Company of California v. S.S. Rotti* (N.D.Cal. 1967) 286 F.Supp. 677).

[2]At trial, both parties agreed that the standard of care as codified in the Radar Amendment was applicable to this case, even though the amendment was not effective as a statute at the time of the collision (Rep.Tr. 8, 11; Appx. I to Pet., p. v; 286 F. Supp. 679).

QUESTIONS PRESENTED

The questions stated by petitioner (Pet., pp. 2-3) are not accurate. The court of appeals affirmed the decision of the district court which had determined that, under the circumstances, the Rotti's failure to reduce its full ahead speed of 12 knots upon entry into a dense fog was a violation of the moderate speed requirements of Rule 16(a). In addition, the district court found that the Rotti also committed serious faults in its subsequent navigation. The courts below did not apply, or even mention, the so-called "half sight" rule referred to in petitioner's statement of the questions presented (Pet., p. 2).

The questions presented, therefore, are:

1. Was there substantial evidence to support the district court's findings of fault?

2. Does the so-called "major-minor fault" rule apply when a vessel has proceeded at an immoderate speed in violation of Rule 16(a)? and

3. Should the established rule of equal division of damages be reconsidered in this case in which the petitioning party has been found to have committed substantial and serious contributing faults?

STATEMENT OF THE CASE

Petitioner incorporates (Pet., pp. 4-5) into its statement of the case a chart (attached to the Petition as Appendix IV) which purports to describe the navigation of the Rotti. Neither that chart nor petitioner's statement fully or accurately sets forth the navigational facts upon which the district court relied in finding that the Rotti

committed substantial faults which contributed to the collision. For example, petitioner asserts that the Rotti "reduced to a minimum speed before entering fog or channel" (Appx. IV to Pet., notation 2). Yet, the district court found that the Rotti was proceeding at about 12 knots and entered the fog at the same speed (Appx. I to Pet., p. iii; 286 F.Supp. 678). That finding is in accord with the record (Rep.Tr. 41, lines 1-7, 175, line 25, to 176, line 8, 189, lines 15-19, 192, lines 12-24).[3] In view of petitioner's inaccurate presentation, we set forth the relevant navigational acts of the Rotti:

As the district court found, the Rotti first became aware of the Tuttle when her radar showed "an outbound vessel heading in a westerly direction on the northern part of the channel" (Appx. I to Pet., p. iii; 286 F. Supp. 678). The Rotti was then proceeding at about 12 knots and she entered the fog, which she had earlier seen developing, at the same speed (ibid.). Visibility was no more than 200 to 250 feet and the fog was so dense that the bow of the Rotti could hardly be seen from her bridge (Rep. Tr. 43, 206). On her radar, the Rotti observed the Tuttle crossing the channel but made no change in speed until the Tuttle was dead ahead (Rep. Tr. 194; Appx. I to Pet., p. iii; 286 F.Supp. 678-679). At that time the Rotti put her engines on stop (ibid.). Such action was ineffectual to slow down the Rotti as

[3] Similarly, in the tenth notation on the chart, petitioner asserts that at the time of the collision the Rotti "was stopped, or virtually stopped, in the water." Petitioner thus ignores the district court's finding (Appx. I to Pet., p. vi; 286 F.Supp. 680), supported by substantial evidence (Rep.Tr. 211, lines 6-13; 272, lines 2-8; 308, line 14, to 308A, line 15), that the Rotti had headway at the time of the collision.

merely took the power off and there was no braking power other than the friction of the water (Rep.Tr. 194-195, 277-279; Appx. I to Pet., p. vi; 286 F. Supp. 680).

The Rotti remained on stop for only one-half minute and then changed her engines to half ahead and then full ahead as the Tuttle appeared, on the radar, to be proceeding across the channel (Rep.Tr. 156, 196-197; Appx. I to Pet., p. iii; 286 F.Supp. 679). Although the bearing of the Tuttle never exceeded 15 degrees relative off the Rotti's bow, the Rotti's pilot assumed that the Tuttle would proceed across the channel and go south (Rep.Tr. 196-198).

The Rotti continued ahead until its radar showed that the Tuttle was in fact proceeding back toward the Rotti (Rep.Tr. 86, 198-200; Appx. I to Pet., p. iii; 286 F.Supp. 679). The Rotti went on stop and then full astern (Rep. Tr. 200-201; Appx. I to Pet., p. iii; 286 F.Supp. 679). However, in less than a minute the Rotti's pilot eliminated the braking effect of the full astern and returned the engines to stop (ibid.). The Rotti's master explained that a stop was ordered because it was assumed that the Tuttle, which was then only 10 degrees relative off the Rotti's bow and closing (Rep.Tr. 64-65, 66-67, 85-86, 202), would proceed on a course parallel to the Rotti on the outside of the southern boundary of the channel (Rep.Tr. 30, 54). The pilot, on the other hand, frankly admitted "I didn't know exactly then what he [the Tuttle] was going to do, whether he was going to stay there or not" (Rep.Tr. 224, lines 5-7). He decided to "wait and see what's going to happen" (Rep.Tr. 201, line 25, to 202, line 1).

The Rotti continued to glide ahead on stop as the Rotti and the Tuttle came closer and closer together and as, in the words of the Rotti's radar officer, "a dangerous situation" developed (Rep.Tr. 87, line 7). The Rotti was finally put on full astern when it became apparent on her radar that the Tuttle had turned back into the channel (Rep.Tr. 202-203, 204-205; Appx. I to Pet., p. iv; 286 F.Supp. 679). The collision occurred within one minute thereafter (Rep.Tr. 157; Appx. I to Pet., p. iv; 286 F.Supp. 679). At the time of the collision, the Rotti had substantial headway (Rep.Tr. 211, lines 6-13, 272, lines 2-8) and the Tuttle was swinging away from the Rotti (Rep.Tr. 207-209).

ARGUMENT

I. THE DISTRICT COURT'S FINDINGS ARE SUPPORTED BY THE EVIDENCE, AND THE DECISION BELOW CORRECTLY APPLIES THE APPLICABLE STATUTES AND IS CONSISTENT WITH THE LAW AS APPLIED IN OTHER CIRCUITS.

Petitioner's principal argument is founded upon its erroneous assertion that the Ninth Circuit based its affirmance of the district court upon a "rigid application of its 'half-sight' rule" (Pet., p. 7). However, the decisions below make no reference whatever to the so-called "half-sight" rule and neither court applied any such rule. The district court found that the Rotti's failure to reduce its full ahead speed of 12 knots upon entry into the dense fog was, under the circumstances, a violation of Rule 16(a).[4] The court, after reviewing the evidence, referred

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[4]Contrary to the implication in petitioner's brief (pp. 5-6), respondent's counsel did present this argument to the district court (see, e.g., Rep.Tr. 376, lines 20-25; 392, line 23, to 393, line 8; Cl.Tr.

to Rule 16(a) and the Radar Amendment and determined that "the Rotti was under a duty to reduce her speed when entering the fog so as to avoid the possibility of collision" (Appx. I to Pet., p. v; 286 F.Supp. 679). This finding is in accord with decisions from other circuits which have found a violation of Rule 16(a) when a ship fails to reduce speed upon entry into dense fog.

United States v. M/V Wuerttemberg (4 Cir. 1964) 330 F.2d 498, 503;

The Sylvan Arrow (2 Cir. 1939) 104 F.2d 102, 104, certiorari denied (1939) 308 U.S. 603;

Moore-McCormack Lines v. The Esso Camden (S.D.N.Y. 1951) 99 F.Supp. 334, 339;

The Julia Luckenbach (E.D.Va. 1914) 219 Fed. 600, 604-605, affirmed (4 Cir. 1916) 239 Fed. 94.[5]

It is therefore plain that the district court did not ignore the Rotti's use of radar—or any other "circumstance"—in favor of "rigid adherence" to some "technical" rule. On the contrary, the district court expressly rejected petitioner's argument that the Rotti's "use of radar in and of itself" excused her high speed in fog (Appx. I

10, line 7, to 12, line 4). The fact that respondent's counsel also argued that the Rotti violated both the "half-sight" and "full-sight" rules (see Pet., pp. 5-6, 8; Appx. III to Pet., pp. xiii-xiv) is, of course, irrelevant.

[5]Petitioner's assertion (Pet., pp. 8-10) that the decision below conflicts with decisions of the Second Circuit is manifestly erroneous. In finding the Rotti's speed immoderate under the circumstances, the district court cited (Appx. I to Pet., p. v; 286 F. Supp. 679) two decisions from the Second Circuit which found violations of Rule 16(a) under similar circumstances (*The Edward E. Loomis* (2 Cir. 1936) 86 F.2d 705, 708; *Villain & Fassio E. Compagnia v. Tank Steamer E. W. Sinclair* (S.D.N.Y. 1962) 207 F.Supp. 700, 707, affirmed (2 Cir. 1963) 313 F.2d 722, certiorari denied (1963) 373 U.S. 948).

to Pet., p. iv; 286 F.Supp. 679). This rejection is in accord with the Radar Amendment to the Rules which expressly provides that

> "The possession of information obtained from radar does not relieve any vessel of the obligation of *conforming strictly* with sections 1061-1094 of this title *and, in particular,* the *obligations contained in sections 1076 and 1077* [Rule 16] *of this title*" (33 U.S.C. 1075.1; 77 Stat. 203; emphasis added).[6]

In addition, the Annex to the Rules provides that "[a] vessel navigating with the aid of radar in restricted visibility *must,* in compliance with Rule 16(a), go at a moderate speed," and that "[r]adar indications of one or more vessels in the vicinity may mean that 'moderate speed' should be *slower* than a mariner without radar might consider moderate in the circumstances" (Appx. II to Pet., pp. ix-x; emphasis added). In the instant case, the Rotti failed to reduce her speed even though she was aware of the existence of an outbound vessel before she entered the fog. And, as shown in the statement of the case (supra pp. 4-6), the Rotti's maneuvers thereafter were based upon erroneous assumptions derived from insufficient information. The Radar Annex plainly warns that: "Assumptions made on scanty information may be dangerous and should be avoided" (Appx. II to Pet., p. ix).

It is clear that the use of radar does not excuse compliance with moderate speed requirements. As the Court of Appeals for the Second Circuit has observed,

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[6]This statutory provision which was omitted from petitioner's Appendix II is set forth as the Appendix to this brief.

> "* * * the mere use of radar does not justify a failure to obey the rules of navigation generally applicable. Radar is an additional safeguard, * * * but a master who relies on radar alone and disregards any or all other precautions and requirements, statutory or otherwise, does so at his own risk [citing authorities]. Indeed, it is surprising how many collisions continue to occur despite the fact that both vessels are equipped with and are operating radar. We have already had occasion to comment on the fact that by giving a false sense of security radar, when not properly used, may 'increase the chances of collision'" (*Afran Transport Co. v. The Bergechief* (2 Cir. 1960) 274 F.2d 469, 472-473).

Petitioner's suggestion (Pet., pp. 7-8) that the courts should sanction full speed through the narrow San Francisco ship channel in dense fog because such is, assertedly, "the practice of mariners" does not merit serious consideration. When presented with a similar argument as to an alleged practice of proceeding at full speed through fog, this Court replied "However this may be, the custom is not one to which the courts can lend their sanction, as it implies a flagrant disregard of the safety of other vessels" *(The Umbria* (1897) 166 U.S. 404, 409).

The decisions below plainly present no conflict with decisions in other circuits nor do they represent a "rigid adherence" to any particular rule of speed. The district court's finding that the Rotti violated Rule 16(a) is consistent with the applicable statutory law and cases in other circuits and it is supported by the evidence. The court of appeals, therefore, correctly affirmed the judg-

ment of the district court (*McAllister v. United States* (1954) 348 U.S. 19, 20).

II. THERE IS NO BASIS FOR APPLICATION OF THE SO-CALLED "MAJOR-MINOR FAULT" RULE.

In the heading to Point III (p. 10), petitioner erroneously states that "an asserted technical violation of the Ninth Circuit's 'half-sight' rule" was the basis for denying the Rotti the benefit of the "major-minor fault" rule. However, as pointed out in the preceding discussion, the so-called "half-sight" rule is not involved in this case. The district court clearly determined—without reference to any "technical" rule—that the Rotti's action in proceeding at a full ahead of 12 knots into a dense fog was a violation of Rule 16(a) (Appx. I to Pet., p. v; 286 F. Supp. 679). The district court therefore correctly applied (Appx. I to Pet., pp. v-vi; 286 F.Supp. 679-680) the rule which placed upon the Rotti the burden of showing that this serious statutory violation could not have contributed to the collision.

Lie v. San Francisco & Portland S. S. Co. (1917) 243 U.S. 291, 298;

The Pennsylvania (1873) 10 Wall. (86 U.S.) 136;

States Steamship Co. v. Permanente Steamship Corp. (9 Cir. 1956) 231 F.2d 82, 88;

Anglo-Saxon Petroleum Co. v. United States (2 Cir. 1955) 224 F.2d 86, 87.

Petitioner's suggestion (Pet., p. 10) that the district court and the court of appeals somehow confused Rule 16(b) with Rule 16(a) is totally without foundation. During trial, the parties had agreed that the Radar Amend-

ment, including Rule 16(c), although not effective as a statute at the time of the collision, reflected the applicable standard of care (Rep.Tr. 8, 11; Appx. I to Pet., p. v; 286 F.Supp. 679). The district court found that the Rotti had violated that standard of care (Appx. I to Pet., p. vi; 286 F.Supp. 680) and, in support of that finding, cited *Afran Transport Company v. The Bergechief* (S.D. N.Y. 1959) 170 F.Supp. 893, which applied Rule 16(b). That citation does not indicate that the court was confused as to the applicability of Rule 16(b). It cited the *Afran* case because the provisions of Rule 16(b) are analogous to those of Rule 16(c).

Petitioner apparently urges (Pet., p. 11) that its immoderate speed in violation of Rule 16(a) should be ignored as a "minor" fault. Such an argument is contrary to the principle that strict enforcement of the statutory rules is necessary to prevent collisions. As this Court has observed,

> "[W]hen, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute" (*The Pennsylvania* (1873) 10 Wall. (86 U.S.) 136).

The cases cited by petitioner (p. 11) are not to the contrary. In each, the court below had found, on con-

flicting evidence, that one vessel alone had committed serious and substantial faults (*The Umbria* (1897) 166 U.S. 404, 408-409; *The Ludvig Holberg* (1895) 157 U.S. 60, 70-71). The pronouncements of the so-called "major-minor fault" rule were made in answer to attempts to impeach those findings (ibid.). Contrary to petitioner's assertion (Pet., p. 11), in neither case was the "major-minor fault" rule applied with respect to immoderate speed (see 166 U.S. 412-413; 157 U.S. 70-71). Petitioner has cited no case, and we are aware of none, in which the "rule" has been applied to a serious and substantial statutory violation such as the violation of Rule 16(a) involved in this case.

III. THE DISTRICT COURT CORRECTLY DECREED THAT THE DAMAGES SHOULD BE DIVIDED BETWEEN THE PARTIES.

The district court decreed that damages should be apportioned in accord with "the historic admiralty rule of divided damages in mutual fault collisions" which, "for more than 100 years, has governed * * * the correlative rights and duties of the two ship owners whose vessels have been involved in a collision in which both were at fault" (*Weyerhaeuser S. S. Co. v. U. S.* (1963) 372 U.S. 597, 600, 603). This Court has clearly stated the applicable rule:

> "Where two vessels collide due to the fault of both, it is established admiralty doctrine that the mutual wrongdoers shall share equally the damages sustained by each. * * * This maritime rule is of ancient origin and has been applied in many cases * * *" (*Halcyon Lines v. Haenn Ship Corp.* (1952) 342 U.S. 282, 284).

Petitioner's argument that the rule should be altered in this case is founded upon the erroneous assertion that "it is highly questionable that there was any fault on the part of the 'Rotti'" (Pet., pp. 13-14). The record, however, shows that the Rotti committed serious and substantial faults: first, in her failure to reduce her full ahead speed of 12 knots upon entry into the dense fog, and second, in her navigation thereafter. This is plainly an inappropriate case in which to alter the long-established rule of divided damages.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

Dated at San Francisco, California,
October 17, 1968.

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(Appendix Follows)